Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-707

ARTHUR SANDERS, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PART ONE

The State of Georgia, Respondent, by and through Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, prays that the Application for Writ of Certiorari to the Supreme Court of Georgia to review the judgment entered in this case on June 2, 1975, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 234 Ga. 586, 216 S.E.2d 838 (1975). It is also set out as "Exhibit A" in Petitioner's Petition for Writ of Certiorari, Appendix.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether a jury of five persons is constitutionally adequate under the Sixth and Fourteenth Amendments of the Constitution of the United States.

2. Whether the motion picture film "Deep Throat" is obscene as a matter of law and is therefore not protected expression under the First and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the Constitutional and statutory provisions set forth in Appendix "B" of the Petition for Certiorari.

STATEMENT OF FACTS

On or about August 31, 1973, Petitioner began exhibiting a motion picture film entitled "Deep Throat" at the Gay Paree Cinema. Ten dollars per person was charged as an admission fee. The film portrayed acts of sexual intercourse between male and female humans, lewd exposure of the sexual organs of male and female humans, and male and female humans caressing and indecently fondling the sexual organs of other persons. The predominant theme of the film emphasized acts of fellatio; repeated in scene after scene. Also explicitly shown are actual acts of masturbation, coitus, cunnilingus and anal intercourse. On the same day the

Appellant began to exhibit the film, a search warrant issued, Petitioner was arrested for distributing obscene materials and one copy of the film was seized. After a preliminary hearing Petitioner continued to show the film and another arrest took place on September 5, 1973. Petitioner continued to exhibit the film and on September 6, 1973, the District Attorney brought a civil action to enjoin the exhibition of the film. A permanent injunction was granted on September 10, 1973, after a jury trial in the Superior Court.

The Solicitor General of the Criminal Court of Fulton County, Georgia, filed a two count accusation alleging that the dates of the offenses were essential averments and the case came to trial on May 13, 1974. Under authority of the act establishing the Criminal Courts of Fulton County—Georgia Laws 1890-1891, p. 935—as amended, Petitioner was tried by a five person jury. The jury found Petitioner guilty on both counts and the court sentenced him to two twelve month sentences to be served consecutively and a two thousand dollar fine. A motion for new trial was denied on November 12, 1974, and appeal was taken to the Georgia Court of Appeals. However, upon State's motion the appeal was transferred to the Supreme Court of Georgia. The case below was affirmed on June 2, 1975.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THE INSTANT CASE DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, NOR DECIDE SUBSTANTIAL FEDERAL QUESTIONS OF NATIONWIDE IMPORT.

1. A JURY OF FIVE PERSONS IS CONSTITU-

TIONALLY ADEQUATE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

Petitioner was tried by a jury of five persons. Under the statute creating the Criminal Court of Fulton County, juries are composed of five persons stricken from a panel of twelve and the defendant is entitled to four preemptory strikes and the State three. The Defendant gets first and last preemptory strikes. Ga. Laws 1890-1891, p. 935, as amended. The court was created in 1891 and why the number of jurors was fixed at five is not known. The Criminal Court of Fulton County is a court of limited jurisdiction and may only try misdemeanors, Ga. Laws 1890-1891, p. 935, as amended. It is the only Georgia court of misdemeanor jurisdiction with a five man jury. Jury verdicts in the Criminal Court of Fulton County must be unanimous as they must be in all Georgia Courts. Ball v. Ga., 9 Ga. App. 162, 20 S.E. 888 (1911).

The five man jury has been upheld in Georgia. McIntyre v. Ga., 190 Ga. 872, 11 S.E. 624 (1940), Willis v. Ga., 122 Ga. App. 776 (1970).

The five man jury comports with this Court's decision in Williams v. Florida, 399 U.S. 78 (1970). In that case, this Court held a six man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge'. Duncan v. Louisiana, supra, 391

U.S., at 156, 88 S.Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained*. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size.

> It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more "chances" of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) Williams v. Florida, 399 U.S. 78, 103, 104, (1970).

In the instant case, the defendant was entitled to a unanimous verdict and an extra preemptory strike.

It is clear from the *Williams* case that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One important factor is the insulation provided by a lay body standing between the government and the defendant. *See* Baldwin v. New

York, 399 U.S. 66 (1970); Torres v. Delgado, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Petitioner has not complained that an arbitrary exclusion of a particular class has taken place. Williams v. Florida, 399 U.S. 78 (1970).

Petitioner argues that a lesser number than 12 or six denies a cross-section—however, this Court said in *Williams:*

> ". . . the concern that the cross-section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." Williams v. Florida, 399 U.S. 104 (1970).
>
> As one commentator has said (speaking of civil cases),
>
> "Because the members of the five man jury represent a cross-section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detachment, the non-professional sense of values, and the spirit of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a "casual tribunal" attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." THE FIVE-MAN CIVIL JURY 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimal number of jurors may be under the Sixth Amendment, however, in *Williams* this Court hinted in a footnote that six is above the minimum:

> "We have no occasion in this case (*Williams*) to determine what minimum number can still constitute "a jury", *but we do not doubt that six is above that minimum*" (emphasis supplied) Williams v. Florida, 399 U.S. 78, 92 N. 28.

In Johnson v. Louisiana, 406 U.S. 356 (1971) this court went further and considered the jury system of Louisiana.

> "Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. Williams v. Florida, 399 U.S. 78 (1970).
>
> . . . As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." Johnson v. Louisiana, 406 U.S. 356, 364, 365 (1971).

It is clear that Sixth Amendment requires a jury trial in any case other than a "petty offense", Baldwin v. New York, 399 U.S. 66 (1970), but it is also clear that the number of jurors is constitutionally irrelevant as long as it is enough to carry out the juries historical function and five jurors is adequate for that purpose.

Williams v. Florida, 399 U.S. 78 (1970); Johnson v. Louisiana, 406 U.S. 356 (1971).

2. THE MOTION PICTURE FILM "DEEP THROAT" IS OBSCENE AS A MATTER OF LAW AND IS THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The motion picture film "Deep Throat" has national acclaim—as one of the most obscene films ever made. As one court described it,

> "In the instant case, the trial judge as trier of the facts viewed the film "Deep Throat" and found that it was obscene under the *Miller* test. The court found that it was hard-core pornography and "was nothing more or less than a so-called 'stag film'. . . ." On the basis of our viewing the film, it is clear that this is an accurate categorization.
>
> The film "Deep Throat" is for the most part a series of explicit depictions of sexual acts including cunnilingus, fellatio, masturbation, normal and anal intercourse, and group sex. Effort was obviously made by the film makers to concentrate on the actors' genitals during the scenes of sexual activity. Well over half of the length of the film was devoted to displaying the explicit sexual acts. The satirical scenes referred to by some of Petitioner's witnesses were brief and sophomoric, serving as little more than introductions to the scenes of explicit sexual activity.
>
> "This case is the first case in which the question of hard-core pornography has been considered by this Court since the *Miller* definition was formulated by the Supreme Court. The film is clearly within the *Miller* definition of obscenity or hard-core pornography. In fact, "Deep Throat" would probably be deemed obscene under any meaningful definition of that term, including that set forth by the plurality opinion in *Memoirs*."

Mangum v. Maryland Board of Censors, 273 Md. 176; 328 A.2d 283 (1974).

Other jurisdictions have held the film to be obscene. U. S. v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973); Coleman v. Wilson, 123 N.J. Super. 310, 302 A.2d 555 (1973); People v. Mature Enterprises, Inc., 73 Misc. 2d 749, 343 N.Y.S. 2d 911 (1973).

In the State of Georgia, this same film was held obscene by a jury in the civil action which grew out of this case. S. S. W. Corporation v. Slaton, 231 Ga. 734, 204 S.E.2d 155 (1974) and by a separate criminal jury in the instant case.

The film was before this court in another case decided on other grounds. Hicks v. Miranda, 422 U.S. 332 (1975).

The film is hard-core pornography at its very worst and is obscene in every sense of the word.

Prior decision of this Court after *Roth* but before *Miller* are of no help to the petitioner so far as the materials involved. Many were so called *Redrup* reversals, Redrup v. N. Y., 386 U.S. 767 (1967), and others were plurality decisions and have value as precedent.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power.
>
> In the absence of a majority view, this Court was compelled to embark on the practice of summarily

reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* "policy". Miller v. California, 93 S.Ct. 2607, 2614 N. 3 (1973).

Now that "separate tests" no longer exist, these *Redrup* cases are useless as precedent.

CONCLUSION

Wherefore, the respondent prays that the Petitioner's Writ of Certiorari to the Supreme Court of Georgia be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three (3) copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid addressed to Robert Eugene Smith, Esquire and Gilbert H. Dietch, Esquire, 2005-100 Colony Square, Atlanta, Georgia 30361, counsel of record for Petitioner, and Glen Zell, Esquire, 15 Peachtree Street, N. E., Atlanta, Georgia 30303, of counsel for Petitioner.

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